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15 **UNITED STATES DISTRICT COURT**
16 **CENTRAL DISTRICT OF CALIFORNIA**

17 ANGEL AGUIAR, Individually and on
18 Behalf of All Others Similarly Situated,

19 Plaintiff,

20 vs.

21 MERISANT COMPANY, and WHOLE
22 EARTH SWEETENER COMPANY,
23 LLC,

24 Defendants.

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Civil No.: 2:14-cv-00670-RGK-AGR

**PLAINTIFF'S NOTICE OF
MOTION, MOTION, AND
MEMORANDUM IN SUPPORT OF
MOTION FOR APPROVAL OF
ATTORNEYS' FEE AWARD,
EXPENSE REIMBURSEMENT,
AND INCENTIVE AWARD**

Judge: Hon. R. Gary Klausner
Date: February 2, 2015
Time: 9:00 a.m.
Ctvm: 850

27
28 NOTICE OF MOTION, MOTION, AND
MEMORANDUM OF LAW IN SUPPORT
OF FEE AWARD

Civ. No.: 2:14-cv-00670-RGK(AGRx)

**NOTICE OF MOTION AND MOTION FOR APPROVAL OF
ATTORNEYS' FEE AWARD, EXPENSE REIMBURSEMENT, AND
INCENTIVE AWARD**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 2, 2015 at 9:00 a.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable R. Gary Klausner located at 255 East Temple Street, Courtroom 850, Los Angeles, California 90012, Plaintiff Angel Aguiar ("Plaintiff") will, and hereby does, move the Court for an order granting final approval of the Attorneys' Fee Award, Expense Reimbursement, and Incentive Award.

This Motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the evidentiary submissions, including the Declaration of Amanda F. Lawrence, and such other evidence and argument as may be presented at or before the hearing.

DATED: December 18, 2014

Respectfully submitted,
SCOTT+SCOTT,
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By: /s/ Amanda F. Lawrence

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MEMORANDUM

Plaintiff Angel Aguiar (“Plaintiff”) hereby respectfully moves the Court for the entry of an Order approving: (i) Plaintiff’s Counsel’s requested fee award of 23% of the Settlement Fund, plus reimbursement of \$118,854.00 in expenses Plaintiff’s Counsel incurred in the prosecution of this action; and (ii) payment of an incentive award of \$4,000.00 to the named Plaintiff.

I. INTRODUCTION

As set forth in Plaintiff’s Memorandum of Points and Authorities in Support of Plaintiff’s Motion for Final Approval of Class Action Settlement and Request for Entry of Final Judgment (“Final Approval Memorandum”),¹ the Settlement is the result of substantial and vigorous advocacy and hard-fought, arm’s-length, negotiations conducted by skilled and experienced counsel. The Settlement is an outstanding resolution of this high-risk, complex litigation and provides substantial monetary and injunctive relief to a nationwide Class of purchasers of Pure Via Consumer Products. Through Plaintiff’s Counsel’s efforts, a Settlement Fund of \$1,650,000 has been created where eligible Class members may receive up to a \$30.00 cash refund. The Settlement also requires Defendants Merisant Company (“Merisant”) and Whole Earth Sweetener Company LLC (“Whole Earth”) (collectively, “Defendants”) to make substantive changes to the Pure Via Consumer Product packaging and amendments to the purevia.com website (the “Injunctive Relief”) that resolve Plaintiff’s claims that labeling and marketing of the Pure Via Consumer Products were false and misleading. For their efforts in achieving this result, Plaintiff’s Counsel seek an award of attorneys’ fees in the amount of 23% of the Settlement Fund, plus reimbursement of \$118,854 in

¹ Plaintiff incorporates by reference the Final Approval Memorandum. All capitalized terms not otherwise defined are defined in the Class Settlement Agreement. ECF No. 109-1.

1 expenses, for a total fee and expense award of \$495,000. Therefore, although the
 2 Settlement Agreement provided that Plaintiff's Counsel could have asked for up to
 3 30% of the Settlement Fund, the amount of attorneys' fees requested is lower and
 4 the total amount sought, \$495,000, represents *both* attorneys' fees *and* expenses.²
 5 Plaintiff's Counsel also seek an award of \$4,000 to the named Plaintiff for her
 6 time, effort and contributions to the prosecution of this action. Defendants do not
 7 oppose this award request.

8 As discussed below, the fee requested is reasonable when considered under
 9 the applicable standards and is well within the normal range of awards made in
 10 contingent-fee consumer class actions in the Ninth Circuit. This is particularly true
 11 given the excellent result achieved and the considerable risks attendant in bringing
 12 and pursuing this Action. Plaintiff's objective in filing this lawsuit was to remedy
 13 the alleged deception in Defendants' marketing and labeling of the Pure Via
 14 Consumer Products. Plaintiff's Counsel reached a Settlement of the Action that
 15 achieves this goal. The expenses requested by Plaintiff's Counsel are likewise
 16 reasonable in amount and they were necessarily incurred in the successful
 17 prosecution of the litigation. Accordingly, reimbursement of expenses also should
 18 be approved. Finally, the requested incentive fee award for Plaintiff is reasonable,
 19 as well as standard, for this type of action and should be approved.

20 **II. FACTUAL AND PROCEDURAL HISTORY OF THE LITIGATION**

21 The Declaration of Amanda F. Lawrence ("Lawrence Decl.") is an integral
 22 part of this submission. Plaintiff respectfully refers the Court to that Declaration
 23 for a detailed description of the factual and procedural history of the litigation, the
 24 extensive investigation and discovery undertaken, the settlement negotiations,

25 _____
 26 ² \$1,650,000 Settlement Fund x 30% = \$495,000. \$495,000 - \$118,854 in
 27 expenses = \$376,146, which represents 23% of the Settlement Fund. Also, the
 28 final percentage will be even less, as the final lodestar does not include the attorney
 time spent subsequent to submission of the billing records.

1 Plaintiff's Counsel's experience, and the numerous risks and uncertainties
2 presented in this Action.

3 **III. THE REQUESTED ATTORNEYS' FEE AWARD IS REASONABLE**

4 **A. The Legal Standard Governing Attorneys' Fee Awards in**
5 **Common Fund Cases Supports the Requested Award**

6 **1. A Reasonable Percentage of the Fund Recovered Is**
7 **the Appropriate Method for Awarding Attorneys'**
8 **Fees in Common Fund Cases**

9 For their efforts in creating a common fund for the benefit of the Class,
10 Plaintiff's Counsel seek a reasonable percentage of the Fund recovered as
11 attorneys' fees. The percentage method of awarding fees has become an accepted,
12 if not the prevailing, method for awarding fees in common fund cases in this
13 Circuit and throughout the United States. Indeed, the fee requested here is
14 approximately a 0.45 multiplier, and Plaintiff's Counsel are actually receiving a fee
15 lower than their lodestar, as discussed below.

16 It has long been recognized in equity that "a private plaintiff, or his attorney,
17 whose efforts create, discover, increase or preserve a fund to which others also
18 have a claim is entitled to recover from the fund the costs of his litigation,
19 including attorneys' fees." *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th
20 Cir. 1977). The purpose of this doctrine is to avoid unjust enrichment so that
21 "those who benefit from the creation of the fund should share the wealth with the
22 lawyers whose skill and effort helped create it." *In re Wash. Pub. Power Supply*
23 *Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("WPPSS"). This rule, known
24 as the common fund doctrine, is firmly rooted in American case law. *See, e.g.,*
25 *Trustees v. Greenough*, 105 U.S. 527 (1881); *Cent. R.R. & Banking Co. of Ga. v.*
26 *Pettus*, 113 U.S. 116 (1885).

27 In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court
28 recognized that "under the 'common fund doctrine'" a reasonable fee may be

1 based “on a percentage of the fund bestowed on the class.”³ In this Circuit, the
2 district court has discretion to award fees in common fund cases based on either
3 the so-called lodestar/multiplier method or the percentage-of-the-fund method.
4 *WPPSS*, 19 F.3d at 1296. In *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d
5 268 (9th Cir. 1989); *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d
6 1301 (9th Cir. 1990); *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370 (9th Cir.
7 1993); and *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir. 2002), the Ninth
8 Circuit expressly approved the use of the percentage method in common fund
9 cases. Moreover, supporting authority for the percentage method in other circuits
10 is overwhelming.⁴

11 Since *Paul, Johnson* and its progeny, district courts in this Circuit have
12 almost uniformly shifted to the percentage method in awarding fees in
13 representative actions. The rationale for compensating counsel in common fund
14 cases on a percentage basis is sound. First, it is consistent with the practice in the
15 private marketplace where contingent-fee attorneys are customarily compensated
16 by a percentage of the recovery. Second, it more closely aligns the lawyers’
17 interest in being paid a fair fee with the interest of the class in achieving the
18 maximum possible recovery in the shortest amount of time. Indeed, one of the
19 nation’s leading scholars in the field of class actions and attorneys’ fees, Professor
20

21 ³ Unless otherwise noted, citations are omitted and emphasis is added.

22 ⁴ Courts in other circuits favor the percentage-of-recovery approach for the
23 award of attorneys’ fees in common fund cases. Two circuits have ruled that the
24 **percentage method is mandatory in common fund cases**. *Swedish Hosp. Corp. v.*
25 *Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I Condo. Ass’n v. Dunkle*, 946 F.2d
26 768, 774-75 (11th Cir. 1991). Other circuits and commentators have expressly
27 approved the use of the percentage method. *Gottlieb v. Barry*, 43 F.3d 474 (10th
28 Cir. 1994); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454 (10th Cir. 1988)
(citing *Blum*, 465 U.S. at 900 n.16, recognizing both “implicitly” and “explicitly”
that a percentage recovery is reasonable in common fund cases); *Harman v.*
Lyphomed, Inc., 945 F.2d 969, 975 (7th Cir. 1991); *Goldberger v. Integrated Res.,*
Inc., 209 F.3d 43 (2d Cir. 2000); Report of the Third Circuit Task Force, *Court*
Awarded Attorney Fees, 108 F.R.D. 237, 254 (Oct. 8, 1985).

Charles Silver, of the University of Texas School of Law, has concluded that the percentage method of awarding fees is the only method of fee awards that is consistent with class members' due process rights. Professor Silver notes:

The consensus that the contingent percentage approach creates a closer harmony of interests between class counsel and absent plaintiffs than the lodestar method is strikingly broad. It includes leading academics, researchers at the RAND Institute for Civil Justice, and many judges, including those who contributed to the Manual for Complex Litigation, the Report of the Federal Courts Study Committee, and the report of the Third Circuit Task Force. Indeed, it is difficult to find anyone who contends otherwise. No one writing in the field today is defending the lodestar on the ground that it minimizes conflicts between class counsel and absent claimants.

In view of this, it is as clear as it possibly can be that judges should not apply the lodestar method in common fund class actions.

The Due Process Clause requires them to minimize conflicts between absent claimants and their representatives. The contingent percentage approach accomplishes this.

Charles Silver, *Class Actions in the Gulf South Symposium: Due Process and the Lodestar Method: You Can't Get There from Here*, 74 TUL. L. REV. 1809, 1819-20 (June, 2000) (emphasis added). Therefore, application of the percent of the Fund is entirely appropriate here.

2. An Award of Thirty Percent of the Recovery Is Reasonable

The guiding principle in this Circuit is that a fee award be “reasonable under the circumstances.” *WPPSS*, 19 F.3d at 1295 n.2. The Ninth Circuit has established 25% of the fund as the “benchmark” award for attorneys’ fees, but has

1 held that an award of attorneys' fees up to 33 1/3% of the fund can be reasonable.
2 *Paul, Johnson*, 886 F.2d at 272. Here, when the expenses are considered in the
3 attorneys' fee request, the requested fee award is 23%, or ***below the 25%***
4 ***benchmark***. The requested attorneys' fees are thus reasonable and should be
5 approved, as they are within – indeed below – the range of fee awards approved by
6 Courts in the Ninth Circuit, and are especially appropriate when considered in
7 relation to the efforts of Plaintiff's Counsel, the complexity of the issues, and the
8 substantial litigation risks in the case. *See, e.g., In re Mego Fin. Sec. Litig.*, 213
9 F.3d 454 (9th Cir. 2000) (upholding award of 33 1/3% of settlement fund); *In re*
10 *Heritage Bond Litig.*, No. 02-ML-1475, 2005 WL 1594389, at *14 (C.D. Cal. June
11 10, 2005) (awarding 33 1/3% of the settlement fund). As discussed below,
12 consideration of the relevant factors used by Courts in this Circuit demonstrates
13 that the requested fee award is reasonable under the circumstances, and should be
14 approved.

15 **B. Consideration of the Relevant Factors Used by Courts in**
16 **the Ninth Circuit Justifies a Fee Award of Thirty Percent in**
This Case

17 Plaintiff's Counsel submit that, as the factors discussed below demonstrate,
18 the requested attorneys' fees here is reasonable under the circumstances of this
19 case and should be approved.

20 **1. The Result Achieved**

21 Courts consistently have recognized that the result achieved is an important
22 factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S.
23 424, 436 (1983) ("most critical factor is the degree of success obtained"). Here,
24 Plaintiff's Counsel achieved a tremendous result – a Settlement Fund of
25 \$1,650,000 where Class members can obtain up to \$30.00 in cash and Injunctive
26 Relief which modifies and clarifies the alleged false and misleading advertising
27 and marketing statements. The Settlement Fund represents a certain, present return

1 for the Class to a litigation that would undoubtedly pose substantial risks to
2 recovery. Indeed, certain Class members have the ability to obtain over 100% of
3 the purchase price of Pure Via, as \$5.00 (the minimum cash recovery amount)
4 exceeds the average cost of some Pure Via Consumer Products, up to a maximum
5 recovery of \$30.00. Lawrence Decl., ¶3. Furthermore, the presence of non-
6 quantifiable injunctive relief is “a ‘relevant circumstance’ in determining what
7 percentage of the common fund class counsel should receive as attorneys’ fees.”
8 *Staton v. Boeing Co.*, 327 F.3d 938, 946 (9th Cir. 2003); *see also Larsen v. Trader*
9 *Joe’s Co.*, 11-cv-05188, 2014 WL 3404531, at *9 (N.D. Cal. July 11, 2014). The
10 Injunctive Relief obtained will benefit each and every Class member through the
11 corrective labeling, regardless of whether the Class member submits a claim.
12 Given the inherent litigation risks in this putative nationwide class action, the
13 Settlement is highly significant as it provides tangible benefits without the risks
14 and delays of continued litigation. Thus, it is clear that Plaintiff’s Counsel
15 delivered a significant benefit to Pure Via consumers nationwide. *See, e.g.,*
16 *Vizcaino*, 290 F.3d at 1049 (affirming fee award where settlement generated
17 benefits beyond cash settlement fund).

18 **2. The Skill Required**

19 The successful prosecution of these complex claims required the
20 participation of attorneys experienced in national class action litigation with
21 knowledge of all states’ consumer protection laws. *See Rose v. Bank of Am. Corp.*,
22 5:11-CV-02390, 2014 WL 4273358, at *12 (N.D. Cal. Aug. 29, 2014) (“The
23 ‘prosecution and management of a complex national class action requires unique
24 legal skills and abilities’ that are to be considered when evaluating fees.”);
25 *Heritage Bond*, 2005 WL 1594389, at *12 (“The experience of counsel is also a
26 factor in determining the appropriate fee award.”). From the outset, Plaintiff’s
27 Counsel engaged in a significant effort to obtain the maximum recovery for the

1 Class. Lawrence Decl., ¶69. This included a detailed factual and legal
2 investigation, formal discovery as well as extensive motion practice (motion to
3 dismiss and class certification) and expert discovery and depositions. *Id.* The skill
4 demonstrated by Plaintiff's Counsel in undertaking these actions and in engaging
5 Defendants in settlement talks supports the requested fee. *See Vizcaino*, 290 F.3d
6 1050 n.5 (noting that timely early resolution may be a relevant circumstance).

7 **3. The Novelty and Difficulty of the Questions Presented**

8 The novelty and difficulty of the issues in a case are significant factors to be
9 considered in making a fee award. *See, e.g., Vizcaino v. Microsoft Corp.*, 142 F.
10 Supp. 2d 1299, 1306 (W.D. Wash. 2001). This case was novel and difficult in
11 light of the scientific background required to understand the complex chemical
12 composition and processing of the Pure Via ingredients. Lawrence Decl., ¶71.
13 The issue in this case concerned the marketing of a sugar alternative containing
14 allegedly artificial and synthetic ingredients with various suggestive, but not
15 necessarily explicit, claims that the product was "all natural" and made
16 predominantly from the stevia plant. There is no established statutory or
17 regulatory definition of what constitutes a natural product. Moreover, the
18 statements challenged appeared in a variety of media, including on the Pure Via
19 Consumer Products' labels and website, all of which included different variations
20 and combinations of phrases so that Plaintiff was tasked with the particularly
21 difficult challenge of demonstrating a common message or theme. For these
22 reasons, this factor weighs in favor of the requested fee award. *Cf. Johnson v.*
23 *Gen. Mills, Inc.*, SACV 10-00061-CJC, 2013 WL 3213832, at *6 (C.D. Cal. June
24 17, 2013) (finding that action involving complex scientific evidence supported
25 requested fee award).

4. The Risks of Continued Litigation

Numerous cases have recognized that risk is an important factor in determining a fair fee award. *See, e.g., WPPSS*, 19 F.3d at 1299-1301; *Vizcaino*, 290 F.3d at 1048 (risk of dismissal or loss on class certification is relevant to evaluation of a requested fee). Uncertainty that an ultimate recovery would be obtained is highly relevant in determining risk. *WPPSS*, 19 F.3d at 1300; *see also Heritage Bond*, 2005 WL 1594389, at *14 (“The risks assumed by Class Counsel, particularly the risk of non-payment or reimbursement of expenses, is a factor in determining counsel’s proper fee award.”). Here, as set forth in the Lawrence Declaration, substantial risks and uncertainties were present from the outset of this litigation that made it far from certain that any recovery for the Class would be obtained. As a complex consumer class action on behalf of a putative nationwide Class, this case would entail hard-fought and lengthy litigation. This case has already involved extensive discovery, motion practice, and depositions. If litigation were to continue, further party and non-party discovery would be sought, requiring time-consuming review. The case also would require further extensive expert analysis of the Pure Via ingredients, as well as the consumer impact of Defendants’ representations regarding the products’ purported attributes. The case likely would (and indeed, had already) shape up to be a battle of the experts, and thus, expert expenses would be even more substantial. *See, e.g., Johnson*, 2013 WL 3213832, at *6 (finding that action involving complex scientific evidence, which necessitated expensive experts, supported requested fee award).

As a putative nationwide class action, complex legal and factual issues were, and would continue to be, the subject of pretrial motions, including those for class certification. The class-certification decision likely would lead to the inevitable Rule 23(f) interlocutory appeal, potentially delaying prosecution of the case should a stay pending appeal be granted. Given the prospect of protracted litigation,

engendering enormous time and monetary expenditure, this factor weighs in favor of Plaintiff's Counsel's application.

5. The Contingent Nature of the Fee and the Financial Burden Carried by Plaintiff's Counsel

The Ninth Circuit has long recognized that the public interest is served by rewarding attorneys who assume representation on a contingent basis to compensate them for the risk that they might be paid nothing at all for their work. *WPPSS*, 19 F.3d at 1299 ("Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose."); *Vizcaino*, 290 F.3d at 1051 (courts reward successful class counsel in contingency cases "for taking the risk of nonpayment by paying them a premium over their normal hourly rates"). It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. *See* Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* §21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless of whether they win or lose. *See WPPSS*, 19 F.3d at 1299.

Plaintiff's Counsel undertook this action on an entirely contingent-fee basis, assuming a substantial risk that the litigation would yield no, or very little, recovery and leave them uncompensated for their time, as well as for their substantial out-of-pocket expenses. Lawrence Decl., ¶73. Indeed, Plaintiff's Counsel have received no compensation for their efforts and costs during the course of this litigation. *Id.*, ¶75. Absent this settlement, there was a sizeable risk

1 that, at the end of the day, Class members, as well as their counsel, would obtain
2 no recovery. Despite the litigation risks, Plaintiff's Counsel were able to forge a
3 resolution that provides significant monetary relief to the Class as well as a
4 cessation of the alleged actionable statements on the Pure Via packaging and
5 advertising. Thus, there is little doubt that Plaintiff's Counsel undertook a
6 significant risk here and the fee award, respectfully, should reflect that risk.

7 **6. The Customary Fee**

8 If this were a non-representative litigation, the customary fee arrangement
9 would be contingent, on a percentage basis, and in the range of 30% to 40% of the
10 recovery. *See, e.g., Blum*, 465 U.S. at 904 ("In tort suits, an attorney might receive
11 one-third of whatever amount the plaintiff recovers.") (Brennan, J., concurring); *In*
12 *re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000)
13 (citing sources indicating private contingent-fee arrangements are in the range of
14 30%-40% of the recovery). Accordingly, the customary contingent fee in the
15 private marketplace supports a finding that the fee requested in this case is
16 reasonable.

17 **7. Plaintiff's Counsel's Percent Fee Award Is Consistent** 18 **with Fee Awards in Similar Consumer Class Action** **Litigation**

19 Courts often look at fees awarded in comparable cases to determine if the fee
20 requested is reasonable. *Vizcaino*, 290 F.3d at 1050 n.4. "[I]n 'most common fund
21 cases, the award exceeds [the 25%] benchmark.'" *Vasquez v. Coast Valley*
22 *Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010). As described *supra*, the
23 requested fee in this case is below that 25% benchmark. Further, cases of under
24 \$10 million will often result in fees above 25%. *See Van Vranken v. Atlantic*
25 *Richfield Co.*, 901 F. Supp. 294, 297-98 (N.D. Cal. 1995) (citing cases). The fees
26 paid in comparable cases, as well as empirical research, support the fee award
27 requested here. *See, e.g., Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200,

1 1210 (C.D. Cal. 2014) (finding 33% attorneys' fee award of a \$3.3 million
2 settlement "reasonable" in a consumer class action for violation of the Telephone
3 Consumer Protection Act); *Rigo v. Kason Indus., Inc.*, 11-CV-64, 2013 WL
4 3761400, at *7 (S.D. Cal. July 16, 2013) (remarking that "the request for attorneys'
5 fees in the amount of 30% of the common fund falls below the 31.71% average
6 awarded in cases with common funds"); *Stuart v. RadioShack Corp.*, No. C-07-
7 4499, 2010 WL 3155645, at *2 (N.D. Cal. Aug. 9, 2010) (in a consumer class
8 action concerning defendant's failure to reimburse employees for expenses
9 incurred, the court approved a fee award of 1/3 of the total maximum settlement
10 amount of \$4.5 million); *see also In re Mego Fin. Sec. Litig.*, 213 F.3d 454 (9th
11 Cir. 2000) (upholding award of 33 1/3% of fund); *In re Pacific Enterprises Sec.*
12 *Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming fee award equal to 33% of
13 fund); *Heritage Bond*, 2005 WL 1594389, at *14 (33 1/3% fee award); *Garner v.*
14 *State Farm Mut. Auto Ins. Co.*, No. cv 08 1365, 2010 WL 1687829, at *2 (N.D.
15 Cal. April 22, 2010) (30% fee award); *In re Activision Sec. Litig.*, 723 F. Supp.
16 1373, 1375 (N.D. Cal. 1989) (32.8% fee award).

17 **8. Reaction of the Class**

18 A robust notice program was implemented in connection with the
19 Settlement. Combining the mailed notice, published notice, web-based banner-
20 style notice campaign with the keyword search, and social media notice
21 campaigns, the overall web-based notice campaign delivered more than an
22 estimated 25.3 million web impressions and was displayed to over 45 million
23 readers via the print publications in *People Magazine* and *USA Today*. *See*
24 Declaration of Jeffrey D. Dahl ("Dahl Decl."), ¶¶13-14, 23, attached to the
25 Lawrence Declaration as Exhibit A. To date, no objections to the requested
26
27

1 amount of attorneys' fees and expenses have been received.⁵ *Id.*, ¶33. The Third
2 Circuit has noted that a low level of objections is a "rare phenomenon." *In re Rite*
3 *Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005). The reaction of the Class,
4 therefore, weighs heavily in favor of approving the fee request. *See, e.g., Heritage*
5 *Bond*, 2005 WL 1594403, at *21.

6 **IV. THE REQUESTED FEE IS MORE THAN REASONABLE UNDER A**
7 **LODESTAR CROSS-CHECK**

8 The first step in applying the lodestar cross-check is to determine the dollar
9 value of the proposed percentage fee award. Here, Counsel requests a fee and
10 expense award of \$495,000. The next step requires the Court to ascertain the
11 lodestar figure by multiplying the number of hours worked by the hourly rate of
12 counsel. The Court can then determine an implied multiplier that may be assessed
13 for reasonableness by taking into account the contingent nature and risks of the
14 litigation, the results obtained, and the nature and quality of the services rendered
15 by plaintiffs' counsel. *See, e.g., Hensley*, 461 U.S. 424. In so doing, "courts have
16 routinely enhanced the lodestar to reflect the risk of non-payment in common fund
17 cases.'" *Vizcaino*, 290 F.3d at 1051.

18 Here, the cumulative number of hours expended by Plaintiff's Counsel is
19 2,275, and the resulting lodestar for the services performed is \$1,090,595.⁶ The
20 requested fee is, therefore, much less than the lodestar. A multiplier of less than
21 one-half (*i.e.*, 0.45) demonstrates that the requested fee is within the range of
22 reasonableness, because that it is common for courts to even enhance the lodestar

23
24
25 ⁵ The deadline to object is January 2, 2015. Plaintiff will be able to apprise
the Court in her reply brief as to the final tally of any objections.

26 ⁶ *See* Declaration of Daryl F. Scott ("Scott Decl."), a true and correct copy of
27 which is attached as Exhibit D to the Lawrence Decl. and the Declaration of E.
Kirk Wood ("Wood Decl."), a true and correct copy of which is attached as Exhibit
E to the Lawrence Decl.

1 in complex litigation.⁷ In wholly contingent consumer class actions like this one,
2 California courts have approved fee awards with multipliers of 2 and even higher.
3 *See, e.g., Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 225 (2001)
4 (“Multipliers can range from 2 to 4 or even higher”); *Chavel v. Netflix, Inc.*, 162
5 Cal. App. 4th 43, 66 (2008) (same). Again, in this case, no multiplier is being
6 applied and instead, the multiplier is fractional (0.45). Consequently, the
7 attorneys’ fees sought are plainly reasonable using a lodestar cross-check.

8 **V. COUNSEL’S EXPENSES ARE REASONABLE AND WERE**
9 **NECESSARILY INCURRED TO ACHIEVE THE BENEFIT**
10 **OBTAINED**

11 In addition to an award of attorneys’ fees, attorneys who create a common
12 fund for the benefit of a class are also entitled to payment of reasonable litigation
13 expenses and costs from the fund. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722
14 (7th Cir. 2001); *Matter of Cont’l Ill Sec. Litig.*, 962 F.2d 566, 570 (7th Cir. 1992).
15 Plaintiff’s Counsel in this case have incurred expenses in the aggregate amount of
16 \$118,854 while prosecuting the action, and these expenses are set forth in the Scott
17 Decl. and the Wood Decl. *See* Lawrence Decl., Exs. D and E.

18 The appropriate analysis to apply in deciding which expenses are
19 compensable in a common fund case of this type is whether the particular costs are
20 of the type typically billed by attorneys to paying clients in the marketplace.
21 *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (“Harris may recover as part of
22 the award of attorney’s fees those out-of-pocket expenses that ‘would normally be
23 charged to a fee paying client.’”); *see also In re Media Vision Tech. Sec. Litig.*, 913
24 F. Supp. 1362, 1366 (N.D. Cal. 1996). Therefore, it is proper to reimburse
25 reasonable expenses even though they are greater than taxable costs. *Id.*; *see also*

26 ⁷ In fact, the multiplier is even lower when expenses are considered. The total
27 lodestar plus expenses is \$1,209,449. When \$495,000 is divided by that number,
the fractional multiplier is actually 0.41, or 41% of the attorneys’ actual fees and
expenses.

1 *Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens County, Okla.*, 8 F.3d
2 722, 725-26 (10th Cir. 1993) (expenses reimbursable if they would normally be
3 billed to client); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1225 (3d Cir. 1995)
4 (expenses recoverable if customary to bill clients for them); *Miltland Raleigh-*
5 *Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993) (“Attorneys may be
6 compensated for reasonable out-of-pocket expenses incurred and customarily
7 charged to their clients, as long as they ‘were incidental and necessary to the
8 representation’ of those clients.”). The categories of expenses for which counsel
9 seeks reimbursement are the type of expenses routinely charged to hourly paying
10 clients and should, therefore, be reimbursed out of the common Fund.

11 A significant component of Plaintiff’s Counsel’s expenses is the cost of
12 experts. Counsel retained experts in the fields of damages and consumer
13 perception of “natural.” These experts were integral to class certification, issuing
14 comprehensive expert reports and sitting for all-day depositions. They also
15 worked closely with Plaintiff’s Counsel and were instrumental in assisting
16 Plaintiff’s Counsel in achieving the result obtained for the Class.

17 Plaintiff’s Counsel also incurred costs while performing computerized
18 research. These are the charges for computerized factual and legal research
19 services such as LexisNexis and Westlaw. It is standard practice for attorneys to
20 use LexisNexis and Westlaw to assist them in researching legal and factual issues
21 and reimbursement is proper. *See Media Vision*, 913 F. Supp. at 1371; *In re Am.*
22 *Bus. Fin. Servs. Inc. Noteholders Litig.*, No. 05-232, 2008 WL 4974782 (E.D. Pa.
23 Nov. 21, 2008) (online legal research reimbursable); *New England Health Care*
24 *Employees Pension Fund v. Fruit of the Loom*, 234 F.R.D. 627 (W.D. Ky. 2006)
25 (electronic database and computer research charges are reimbursable).

26 In addition, Counsel were required to travel in connection with this case.
27 The expenses in this category are reasonable in amount, and are properly charged

1 against the Fund created. *See In re McDonnell Douglas Equip. Leasing Sec. Litig.*,
2 842 F. Supp. 733, 746 (S.D.N.Y. 1994); *Genden v. Merrill Lynch, Pierce, Fenner*
3 *& Smith, Inc.*, 741 F. Supp. 84, 86 (S.D.N.Y. 1990).

4 Photocopying costs are also customarily reimbursed in common fund cases.
5 *See McDonnell Douglas*, 842 F. Supp. at 746. Duplication of documents and
6 pleadings was necessary for the effective prosecution of this case.

7 Other significant expenses that were necessarily incurred in the prosecution
8 of this Action include expenses for the transcription of four separate all-day
9 depositions, electronic document storage and review costs, postage, overnight
10 delivery, telephone and facsimile expenses. Because these expenses were all
11 necessarily incurred by Plaintiff's Counsel in the course of prosecuting this Action,
12 they should be paid from the Settlement Fund. Again, notably, Plaintiff's Counsel
13 are not asking for a separate award of expenses, but that their expenses be
14 approved as a part of the total payment to Plaintiff's Counsel or, in other words, as
15 part of the award of fees and expenses from the \$1,650,000.

16 **VI. THE INCENTIVE AWARD TO PLAINTIFF AGUIAR SHOULD BE**
17 **APPROVED**

18 Upon the conclusion of a successful class action case, the Court has
19 discretion to award the representative plaintiff(s) incentive payments as
20 compensation for the work they did on behalf of the class. *See Rodriguez v. West*
21 *Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) ("Incentive awards are fairly
22 typical in class action cases.") Here, Plaintiff seeks an incentive award in the
23 amount of \$4,000, which is well within the range of incentive awards that have
24 been approved in class action litigation. *See, e.g., Hopson v. Hanesbrand Inc.*,
25 CV-08-0844, 2009 WL 928133, at *10 (N.D. Cal. Apr. 3, 2009) ("In general,
26 courts have found that \$5,000 incentive payments are reasonable."); *Carter v.*
27 *Anderson Merchandisers, LP*, No. 08-0025-VAP (OPx), 2010 WL 1946757, at *4

(C.D. Cal. May 11, 2010) (“Given the relatively small size of the proposed [\$5,000] recognition payments, the Court thus approves the recognition payments requested for [plaintiffs].”). The amount of the requested incentive award was arrived at through negotiations with Defendants, and thus, reflects a realistic assessment by both sides of the effort expended by the named Plaintiff and the amount likely to be awarded had the Parties not reached an agreement. Aguiar invested considerable time in the Action as described in her declaration. *See* Lawrence Decl., Ex. F (Declaration of Angel Aguiar). She took personal time to speak with her attorneys, search for relevant documents, review and approve the Complaint for filing, respond to discovery requests, and prepare and sit for a lengthy deposition. *Id.*, ¶8. This commitment of personal time to support a case that has provided benefits to numerous Class members and the general public nationwide warrants the Court’s approval of the requested incentive award.

VII. CONCLUSION

Plaintiff’s Counsel pursued this challenging litigation to an excellent conclusion for the Class. In light of the significant risks of the case and the extensive and hard-fought motion practice and discovery, the Settlement presented to the Court stands as a testament to the diligent efforts of Plaintiff’s Counsel. Accordingly, Plaintiff’s Counsel respectfully request that the Court award them \$495,000, which include attorneys’ fees of \$376,146 and expenses of \$118,854 as contemplated by the Settlement, to which no one has objected. A modest incentive award of \$4,000 should also be awarded to Plaintiff for her contributions to the case and the Settlement on behalf of the Class.

DATED: December 18, 2014

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2014, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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